Kathryn Ma Wai Fong v Wong Kie Chie & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-02NCvC)(W)-42–01 OF 2020, Q-02(NCvC)(W)-38–01 OF 2020, Q-02(NCvC)(W)-39–01 OF 2020, Q-02(NCvC)(W)-44–01 OF 2020, Q-02(NCvC)(W)-41–01 OF 2020 AND Q-02(NCvC)(W)-43–01 OF 2020

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Companies and Corporations — Shares — Issue of shares — Issuance of shares to deceased shareholder — Respondents applied to nullify shares issued — Appellant applied to validate shares — High Court found shares issued were void — Duomatic principle — Whether there was informal assent to the issued shares — Whether assent must occur prior to shares being issued — Companies Act 1965 ss 63, 132D(1) & 355

The present appeals were related to disputes regarding family-owned entities, namely WTK Realty Sdn Bhd ('WTK Realty'), Southwind Plantation Sdn Bhd ('Southwind') and Ocarina Development Sdn Bhd ('Ocarina') (collectively referred to as 'the companies'). The companies were primarily owned and operated by three brothers, namely, Wong Kie Nai ('WKN'), Wong Kie Yik ('WKY') and Wong Kie Chie ('WKC'). The dispute in the present case was regarding the shares of the companies that were issued to WKN who had since passed away. WKY and WKC ('the respondents), claimed that the shares issued to WKN were void and sought to nullify them. On the other hand, WKN's widow, one Kathryn Ma ('the appellant'), had sought to validate the shares. The High Court found, inter alia, that WKN did not sign Form 11 and that the appellant did not produce the resolution to Form 11 on the issued shares. At the end of the case, the High Court ruled in favour of the respondents, hence, the present appeals. The particulars of the six appeals were as followed: (a) Appeals 42, 39 and 43 were the appellant's appeals against the High Court's decision in nullifying the issuance of 4,000,000 ordinary shares of WTK Realty, 3,000,000 ordinary shares of Southwind, and 1,500,000 shares of Ocarina, to WKN; and (b) Appeals 38, 44 and 41 were the appellant's applications to validate the issuance of the said ordinary shares to WKN under s 63 and/or s 355 of the Companies Act 1965 ('the CA 1965') and the companies' articles of association ('the AA'). The core issues in the present appeals were whether there was informal assent to the issued shares and, if there was, whether the assent must occur prior to the shares being issued. This would entail a discussion on the *Duomatic* principle derived from the case of *In re*

A *Duomatic Ltd* [1969] 2 Ch 365 ('the Duomatic case').

Held, allowing Appeals 42, 39 and 43, setting aside the High Court's decisions including the costs, awarding costs of RM30,000 for each appeal here and below to the appellant subject to allocatur, and refunding any costs paid at the
B High Court to the appellant:

(1) The *Duomatic* case concerned directors' remuneration, which required the shareholders' prior approval under the UK Companies Act 1948 and the company's articles of association. The High Court had misconstrued
C the facts of the *Duomatic* case. The High Court erred in holding that the approval had to be given prior to the shares being issued and had erroneously applied the correct law on the facts. The court opined that the *Duomatic* principle applied whether the assent was given before or after the impugned act in question (see paras 18 & 21).

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(2) There was no dispute that Form 11 was lodged with the Companies Commission of Malaysia, nor was the Form alleged to be forged. Further, WKN had signed the Form, as such, it was incongruous to deem Form 11 invalid. As Kathryn had produced Form 11 evidencing
E that the extraordinary general meeting (EGM) to approve the issuance of the 4,000,000 shares was held on 28 September 2007, the burden lay on WKC to prove that the resolution was not attached to Form 11 or that the EGM never took place, mainly when WKC had access to the companies' books and records. The High Court erred in accepting
F WKC's contention that the resolution was not attached to Form 11 when the burden lay on him to prove so. In any event, even if assuming that there was no resolution attached to Form 11, this did not vitiate the resolution passed at the EGM or render the shares issued void. The court therefore resolute that the High Court erred in disregarding Form 11
G and in failing to hold that WKN had failed to prove his assertion (see paras 22–25).

(3) The High Court had disregarded Form 24 which had been lodged with the Registrar of Companies because WKC did not sign it. The High Court disregarded the fact that both WKN and WKY had signed the
H Form and that it was signed on behalf of the board of directors. The fact that WKC did not sign the Form did not negate assent or knowledge on his part. In this case, many factors inferred WKC's knowledge from his conduct. Informal assent could be evidenced by conduct. The most compelling evidence to prove that the respondents had knowledge and
I acquiesced to the issued shares were the directors' reports from as early as 2005 to 2011 which were consistently approved by the board throughout those years. Further, during WTK Realty's EGM held on 6 April 2013 ('the said EGM') to pass a resolution to convert and capitalise the preference shares, which led to the company's ordinary

shares increasing from 16,400,000 to 19,150,000, WKC and WKY had voted in approval with full knowledge that WTK Realty's shares included the 4,000,000 issued shares. Consequently, they had, by conduct, approved of the issued shares (see paras 26–28 & 31–32).

(4) WKC, under cross-examination, admitted that he knew that the 4,000,000 issued shares were part of the 19,150,000 shares. The suit against Kathryn in respect of the issued shares was filed prior to the said EGM. WKC and WKY could not approbate and reprobate. The High Court clearly failed to find that WKC and WKY had approbated and reprobated. The shareholders' resolution passed at the said EGM to capitalise the share capital, which included the issued shares, must be treated as an affirmation or ratification. All these factors that the court had set out applied to the three companies (see paras 32–34).

(5) The High Court, in its findings, acknowledged that WKN and WKY had subsequent knowledge of the issued shares but held that they did not amount to prior unanimous assent of the shareholders. The High Court failed to consider that the family-owned companies conducted their business informally and would sometimes disregard formal requirements. The High Court had disregarded WKC's admission in his affidavit that not all shares issued in the corporate history of WTK Realty had complied with strict formalities under s 132D(1) of the CA 1965. Under the Duomatic principle, formalities may be disregarded if shareholders had, by conduct, waived the requirements. This was particularly applicable to family-run companies as it was a distinctive hallmark of family-run companies where the affairs were frequently conducted informally and often without adhering to the formal requirements of statutes or the company's AA (see paras 35–36).

(6) A final point to note was the delay by WKC and WKY in seeking declaratory reliefs. Their suits were commenced almost six to seven years after the shares were issued to WKN. The lengthy delay connoted knowledge and acquiescence on their part. As the remedy of declaration was discretionary in nature, the court should be less inclined to grant them where the party seeking the reliefs was guilty of laches. A lengthy delay would amount to acquiescence (see para 37).

[Bahasa Malaysia summary

Rayuan-rayuan semasa adalah berkaitan dengan pertikaian mengenai entiti-entiti milik keluarga, iaitu WTK Realty Sdn Bhd ('WTK Realty'), Southwind Plantation Sdn Bhd ('Southwind') dan Ocarina Development Sdn Bhd ('Ocarina') (secara kolektif dirujuk sebagai 'syarikat-syarikat tersebut'). Syarikat-syarikat tersebut pada dasarnya dimiliki dan dikendalikan oleh tiga adik-beradik lelaki, iaitu, Wong Kie Nai ('WKN'), Wong Kie Yik ('WKY') dan Wong Kie Chie ('WKC'). Pertikaian dalam kes ini adalah mengenai saham

A syarikat yang telah diterbitkan kepada WKN yang telah meninggal dunia. WKY dan WKC ('responden-responden'), mendakwa bahawa saham yang diterbitkan kepada WKN adalah terbatal dan memohon untuk membatalkannya. Sebaliknya, balu WKN, Kathryn Ma ('perayu'), memohon untuk mengesahkan saham tersebut. Mahkamah Tinggi mendapati, antara B lain, bahawa WKN tidak menandatangani Borang 11 dan perayu tidak mengemukakan resolusi bagi Borang 11 mengenai saham yang diterbitkan. Pada akhir kes, Mahkamah Tinggi memutuskan memihak kepada responden-responden, justeru, rayuan-rayuan semasa. Butiran bagi enam rayuan yang difailkan adalah seperti berikut: (a) Rayuan 42, 39 dan 43 adalah C rayuan-rayuan perayu terhadap keputusan Mahkamah Tinggi yang membatalkan penerbitan 4,000,000 saham biasa WTK Realty, 3,000,000 saham biasa Southwind, dan 1,500,000 saham Ocarina kepada WKN; dan (b) Rayuan 38, 44 dan 41 adalah permohonan-permohonan perayu untuk mengesahkan penerbitan saham-saham biasa tersebut kepada WKN di bawah D s 63 dan/atau s 355 Akta Syarikat 1965 ('AS 1965') dan artikel persatuan syarikat ('AA'). Isu teras dalam rayuan-rayuan ini ialah sama ada terdapat persetujuan tidak rasmi terhadap saham yang diterbitkan tersebut dan, jika ada, sama ada persetujuan mesti berlaku sebelum saham tersebut diterbitkan. Ini akan memerlukan perbincangan mengenai prinsip *Duomatic* yang E diperoleh daripada kes *In re Duomatic Ltd* [1969] 2 Ch 365 ('kes Duomatic').

Diputuskan, membenarkan Rayuan 42, 39 dan 43, mengenepikan keputusan Mahkamah Tinggi termasuk kos, memberikan kos RM30,000 bagi setiap rayuan di sini dan di bawah kepada perayu tertakluk kepada alokatur, dan F mengembalikan apa-apa kos yang telah dibayar di Mahkamah Tinggi kepada perayu:

(1) Kes *Duomatic* adalah berkenaan dengan imbuhan pengarah, yang memerlukan kelulusan pemegang-pemegang saham terlebih dahulu di bawah Akta Syarikat UK 1948 dan artikel persatuan syarikat. G Mahkamah Tinggi telah tersalah tafsir fakta kes *Duomatic*. Mahkamah Tinggi terkhilaf apabila berpendapat bahawa kelulusan perlu diberikan sebelum saham diterbitkan dan telah tersilap menggunakan undang-undang yang betul ke atas fakta. Mahkamah berpendapat H bahawa prinsip *Duomatic* terpakai sama ada persetujuan diberikan sebelum atau selepas perbuatan yang dipersoalkan (lihat perenggan 18 & 21).

(2) Tiada pertikaian bahawa Borang 11 telah diserah simpan dengan Suruhanjaya Syarikat Malaysia, dan Borang tersebut juga tidak didakwa I dipalsukan. Selanjutnya, WKN telah menandatangani Borang tersebut, oleh itu, adalah tidak sesuai untuk menganggap Borang 11 tersebut tidak sah. Memandangkan Kathryn telah mengemukakan Borang 11 yang membuktikan bahawa mesyuarat agung luar biasa (EGM) untuk meluluskan penerbitan 4,000,000 saham telah diadakan pada 28

September 2007, beban terletak pada WKC untuk membuktikan bahawa resolusi yang berkaitan tidak dilampirkan pada Borang 11 atau bahawa EGM tersebut tidak pernah berlaku, terutamanya apabila WKC mempunyai akses kepada buku dan rekod syarikat. Mahkamah Tinggi tersilap menerima dakwaan WKC bahawa resolusi tersebut tidak dilampirkan pada Borang 11 apabila beban terletak pada WKC untuk membuktikannya. Walau apa pun, walaupun mengandaikan bahawa tiada resolusi yang dilampirkan pada Borang 11, ini tidak membatalkan resolusi yang diluluskan pada EGM atau menjadikan saham yang diterbitkan tidak sah. Oleh itu, mahkamah memutuskan bahawa Mahkamah Tinggi telah terkhilaf apabila tidak mengendahkan Borang 11 tersebut dan gagal memutuskan bahawa WKN telah gagal membuktikan dakwaannya (lihat perenggan 22–25).

(3) Mahkamah Tinggi telah tidak mengendahkan Borang 24 yang telah diserahkan kepada Pendaftar Syarikat kerana WKC tidak menandatanganinya. Mahkamah Tinggi tidak menghiraukan fakta bahawa kedua-dua WKN dan WKY telah menandatangani Borang tersebut dan bahawa ia telah ditandatangani bagi pihak lembaga pengarah. Fakta bahawa WKC tidak menandatangani Borang tersebut tidak menafikan persetujuan atau pengetahuan di pihaknya. Dalam kes ini, banyak faktor yang boleh mengandaikan pengetahuan WKC daripada kelakuannya. Persetujuan tidak rasmi boleh dibuktikan dengan kelakuan. Keterangan yang paling meyakinkan untuk membuktikan bahawa responden-responden mempunyai pengetahuan dan bersetuju dengan saham yang diterbitkan ialah laporan pengarah dari seawal 2005 hingga 2011 yang telah diluluskan secara konsisten oleh lembaga pengarah sepanjang tahun tersebut. Selanjutnya, semasa EGM WTK Realty yang diadakan pada 6 April 2013 ('EGM tersebut') bagi meluluskan resolusi untuk menukar dan memanfaatkan saham keutamaan, yang menyebabkan saham biasa syarikat meningkat daripada 16,400,000 kepada 19,150,000, WKC dan WKY telah mengundi untuk menyokong dengan pengetahuan penuh bahawa saham WTK Realty adalah termasuk 4,000,000 saham terbitan tersebut. Akibatnya, mereka telah, melalui kelakuan, meluluskan saham-saham yang diterbitkan (lihat perenggan 26–28 & 31–32)

(4) WKC, semasa pemeriksaan balas, mengakui bahawa beliau tahu bahawa 4,000,000 saham terbitan tersebut adalah sebahagian daripada 19,150,000 saham tersebut. Saman terhadap Kathryn berhubung saham terbitan tersebut telah difailkan sebelum EGM tersebut. WKC dan WKY tidak boleh 'approbate and reprobate'. Mahkamah Tinggi jelas gagal untuk mendapati bahawa WKC dan WKY telah 'approbated and reprobated'. Resolusi pemegang saham yang diluluskan pada EGM tersebut untuk menggunakan modal saham, yang juga merangkumi saham terbitan tersebut, mesti dianggap sebagai pengesahan atau

ratifikasi. Semua faktor ini yang telah dinyatakan oleh mahkamah terpakai kepada ketiga-tiga syarikat tersebut (lihat perenggan 32–34).

(5) Mahkamah Tinggi, dalam dapatannya, mengakui bahawa WKN dan WKY mempunyai pengetahuan terkemudian mengenai saham terbitan tersebut tetapi berpendapat bahawa ia tidak sama dengan persetujuan sebulat suara pemegang saham. Mahkamah Tinggi gagal mempertimbangkan bahawa syarikat milik keluarga menjalankan perniagaan mereka secara tidak rasmi dan kadangkala akan mengabaikan keperluan rasmi. Mahkamah Tinggi telah mengabaikan pengakuan WKC dalam afidavitnya bahawa tidak semua saham yang diterbitkan dalam sejarah korporat WTK Realty telah mematuhi formaliti ketat di bawah s 132D(1) AS 1965. Di bawah prinsip *Duomatic*, formaliti boleh diabaikan jika pemegang-pemegang saham telah, melalui kelakuan, mengenepikan keperluan tersebut. Ini amat terpakai kepada syarikat yang dikendalikan oleh keluarga kerana ia merupakan ciri khas syarikat yang dikendalikan oleh keluarga di mana hal ehwal syarikat kerap dijalankan secara tidak formal dan selalunya tanpa mematuhi keperluan rasmi statut atau AA syarikat (lihat perenggan 35–36).

(6) Perkara terakhir yang perlu diberi perhatian ialah kelewatan oleh WKC dan WKY dalam mendapatkan relif-relif pengisytiharan. Saman-saman mereka dimulakan hampir enam hingga tujuh tahun selepas saham-saham tersebut diterbitkan kepada WKN. Kelewatan yang panjang bermakna pengetahuan dan persetujuan di pihak mereka. Memandangkan remedi pengisytiharan adalah bersifat budi bicara, mahkamah sepatutnya kurang cenderung untuk memberikannya apabila pihak yang memohon relif tersebut telah melakukan 'laches'. Kelewatan yang berpanjangan akan berjumlah kepada keakuran (lihat perenggan 37).]

Cases referred to

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252, HC (refd)
Dickinson v NAL Realisations and others (Staffordshire) Ltd (Dickinson, third party and another) [2020] 1 WLR 1122, CA (refd)
EIC Services Ltd and another v Phipps and others [2004] 2 BCLC 589 (refd)
Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237, CA (refd)
Herman v Simon (1990) 8 ACLC 1094 (refd)
In re Duomatic Ltd [1969] 2 Ch 365 (refd)
Jimat bin Awang & Ors v Lai Wee Ngen [1995] 3 SLR(R) 496, CA (refd)
Khaw Tiew Chai v Lee Chai Seng & Ors and another appeal [2018] 12 MLJ 69; [2018] 1 LNS 1516, CA (refd)
Lim Teow Yong & Sons Sdn Bhd v Infolity Sdn Bhd & Anor [2015] MLJU 2312, HC (refd)

Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd and others [1983] Ch 258, CA (refd)
Tan Mei Li & Ors v KSCH Property Sdn Bhd [2019] MLJU 1827; [2019] CLJU 1186, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited [1921] 2 KB 608, CA (refd)
Weatherley v Weatherley and others [2019] 1 BCLC 520 (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 63, 132D, 132D(1), (6), 355, 355(3)(b)
Companies Act 1967 [SG] s 161(1)
Companies Act 1948 [UK]
Rules of Court 2012 O 38 r 2(2)

Alvin Yong (with Shirleen Ong) (Alvin Yong) for the appellants.
George Lim (with Stanley Eddy and Chan Yin Xi) (Battenberg & Talma) in Civil Appeal Nos Q-02NCvC)(W)-42–01 of 2020 and Q-02(NCvC)(W)-38–01 of 2020 for the respondents.
Sim Hui Chuang (Reddi & Co) in Civil Appeal Nos Q-02(NCvC)(W)-39–01 of 2020 and Q-02(NCvC)(W)-44–01 of 2020 for the respondents.
George Lim (with Stanley Eddy and Chan Yin Xi) (Battenberg & Talma) in Civil Appeal Nos Q-02(NCvC)(W)-41–01 of 2020 and Q-02(NCvC)(W)-43–01 of 2020 for the respondents.

Mohamed Zaini Mazlan JCA:

INTRODUCTION

[1] Six appeals came before us. All these six appeals were closely related as they pertained to disputes regarding family-owned entities, namely WTK Realty Sdn Bhd ('WTK Realty'), Southwind Plantation Sdn Bhd ('Southwind') and Ocarina Development Sdn Bhd ('Ocarina').

[2] These companies were primarily owned and run by three brothers. The dispute arose over shares issued to one who has since passed away. The remaining brothers claimed that the shares issued to the deceased brother were void and sought to nullify them. On the other hand, the deceased brother's widow had sought to validate the shares. The High Court had ruled in favour of the two brothers.

[3] The pivotal issues in these appeals are whether there were informal assent

to the issued shares and, if there were, whether the assent must occur prior to the shares being issued. This will entail a discussion on the *Duomatic* principle derived from the case of *In re Duomatic Ltd* [1969] 2 Ch 365.

[4] The late Wong Tuong Kwong ('Wong') was the patriarch of the Wong family and the founder of WTK Realty, which had expanded its subsidiaries and related companies over the years. Southwind and Ocarina were part of the WTK Realty conglomerate. The late Wong had three sons, Wong Kie Nai ('WKN'), Wong Kie Yik ('WKY') and Wong Kie Chie ('WKC'). As in most family-owned businesses, the affairs of WTK Realty and its related companies were managed by the three sons upon Wong's demise in 2004. WKC moved to Australia in the 80s to manage the siblings' businesses, while WKN and WKY remained here to manage WTK Realty and its related companies. WKN, WKY and WKC held equal shares in WTK Realty, Southwind and Ocarina. That was then, as the consternation now concerns the inequality of shares between the three brothers.

[5] The suits filed in the High Court were mainly concerned with the new shares issued to WKN in WTK Realty, Southwind and Ocarina as follows:

Company	Shares issued	Dates issued
WTK Realty	4,000,000	28 September 2007
Ocarina	1,500,000	31 May 2005
Southwind	3,000,000	5 July 2005

[6] WKN passed away in March 2013, leaving behind his widow, Kathryn Ma ('Kathryn'), a son and a daughter. Kathryn was appointed the personal representative, executrix and trustee of WKN's estate. She had requested that shares issued (set out in the table in the preceding paragraph) to WKN in these companies be registered in her name as the executrix of WKN's estate. WKC and WKY refused and commenced suits with respect to the issued shares in the same year of WKN's demise. In essence, they sought to nullify the issued shares because the issuances were in breach of s 132D(1) of the Companies Act 1965 ('the CA 1965') as they were carried out without the shareholders' prior approval. In addition, WKC and WKY also alleged that some of the requirements under the companies' Articles of Association ('AA') were not complied with. The appellant reciprocated by filing her suits where she sought to validate the shares issued under ss 63 and/or 355 of the CA 1965. Therefore, the flipside to the three suits commenced against her were her suits for validation. All six suits were tried jointly at the High Court. As these suits commenced via originating summonses, some deponents testified orally and were subjected to cross-examinations.

[7] For convenience, these appeals shall be referred to as follows:

Appeal number	Referred to as	Companies concerned
Q-02(W)-42–01 of 2020	Appeal 42	WTK Realty
Q-02(NCvC)(W)-38–01 of 2020	Appeal 38	
Q-02(NCvC)(W)-39–01 of 2020	Appeal 39	Ocarina
Q-02(W)-44–01 of 2020	Appeal 44	
Q-02(W)-43–01 of 2020	Appeal 43	Southwind
Q-02(NCvC)(W)-41–01 of 2020	Appeal 41	

[8] The following orders were sought at the High Court against WKN in respect of the following appeals:

(a) Appeal 42: WKC sought to nullify the issuance of 4,000,000 ordinary shares of WTK Realty allotted to WKN on 28 September 2007;

(b) Appeal 38: Kathryn's application to validate the issuance of the 4,000,000 shares of WTK Realty to WKN under s 63 and/or s 355 of the CA 1965 and WKN's AA;

(c) Appeal 39: WKC and WKY sought to nullify the issuance of 3,000,000 ordinary shares of Southwind allotted to WKN on 5 July 2007;

(d) Appeal 44: Kathryn's application to validate the issuance of the 3,000,000 ordinary shares in Southwind under s 63 and/or s 355 of the CA 1965 and WKN's AA;

(e) Appeal 43: WKC and WKY sought to nullify the issuance of ordinary shares in Ocarina on 5 July 2007: 1,500,000 allotted to WKN; and

(f) Appeal 41: Kathryn's application to validate the issuance of the 1,500,000 ordinary shares of Ocarina allotted to WKN under s 63 and/or s 355 of the CA 1965 and Ocarina's AA.

[9] It is not disputed that the issued shares did not comply with the requirements of s 132D(1) of the CA 1965 nor the companies' AA. Kathryn however relied heavily on the principles enunciated in the English case of *In re Duomatic Ltd* [1969] 2 Ch 365 ('Duomatic case') which laid down the proposition that matters which were to be done formally may be done informally, provided that it was assented to by the members of the company. Both sides, including the High Court, were in agreement with this proposition. Kathryn's case in the High Court was that the informal assent of the shareholders occurred after the shares were issued, which would fall under the *Duomatic* principle. This is where WKC and WKY disagreed, as they contended that the informal assent must occur prior to the issuance. The High Court agreed with their proposition.

[10] The core issue of these appeals is whether the High Court erred in holding that the *Duomatic* principle applies only if the assent was obtained prior to the shares being issued.

THE HIGH COURT'S DECISION

[11] The High Court, at the outset, determined that the core issue is whether the shares issued to WKN contravened s 132D of the Companies Act 1965 and the companies AA. The appellant had relied on, amongst others, the following to substantiate her contention that the respondents knew the issued shares:

(a) Form 11 (notice of resolution) regarding WTK Realty's Extraordinary General Meeting ('EGM') held on 28 September 2007, where an ordinary resolution was passed regarding the issued shares in WTK Realty;

(b) Form 24 dated 28 September 2007 (return of allotment of shares); and

(c) audited accounts of WTK Realty.

[12] Concerning Form 11, it is not disputed that it was lodged with the Registrar of Companies. The High Court, however, disregarded it because it was only signed by WKY, and the shareholders' resolution was not produced at trial.

[13] Regarding Form 24, it was also not disputed that it had been lodged with the Registrar of Companies. The High Court similarly held that although WKY signed the Form, WKC did not sign it and that the fact that it was lodged did not provide direct evidence of prior shareholders' approval for the issued shares.

[14] As for the 2007 audited accounts, which contained information on the issued shares, the High Court again held that WKC did not sign it. There were, nevertheless, subsequent audited reports. The High Court held that the subsequent knowledge or consent of the statutory reports and accounts could not be equated with prior approval of the company in general meetings as required under s 132D(1) of the CA 1965. Nevertheless, The High Court held that WKC did not sign any of the audited accounts and could not be deemed to have knowledge or acquiesce to the issued shares. The appellant contended that an adverse inference should be drawn against WKC as he did not call WKY as a witness due to the fact that WKY had signed the audited accounts. The High Court, in refusing to draw an adverse inference, held that as the proceedings were by way of an originating summons and the deponents were subjected to cross-examination on their respective affidavit, the only consequence would be that his affidavit would be disregarded in line with O 38

r 2(2) of the Rules of Court 2012.

[15] The High Court distinguished the *Duomatic* case by stating that there was a prior formal assent of the shareholders, who were also directors, who had a right to attend and vote at a general meeting. The High Court emphasised that the shareholders' approval, be it formal or informal, had to exist prior to the shares being issued and not after.

[16] In respect of the appellant's application for validation under ss 63 and 355 of the Companies Act 1965, the High Court in dismissing the application held that apart from the breaches of the companies' AA, there was no prior shareholders' approval for the issued shares based on the absence of any minutes of the shareholders meeting. The High Court opined that a validation order would cause injustice to WKC as his shares would be diluted and does not fulfil the criteria under s 355(3)(b) of the CA 1965.

FINDINGS

[17] It is not disputed that there were no prior shareholders' approval for the issued shares. The fulcrum of the respondents' argument is premised on s 132D(1) and (6) of the CA 1965, in that shares issued without the company's prior approval in a general meeting shall be void. Learned counsel for the respondents with candour submitted that the approval does not need to be obtained in a general meeting, as held by numerous authorities. This court in *Khaw Tiew Chai v Lee Chai Seng & Ors and another appeal* [2018] 12 MLJ 69; [2018] 1 LNS 1516, in affirming the High Court's decision, held that the issuance of the newshares did not have to be approved by the general meeting because all the existing shareholders are also directors and were present at the board of directors meeting when approving the issuance of the new shares. Singapore's Court of Appeal had similarly held the same in *Jimat bin Awang & Ors v Lai Wee Ngen* [1995] 3 SLR(R) 496 when construing s 161(1) of the Singapore Companies Act, the equivalent of our section 132D. The court there held that '... the unanimous and informal assent by all the members of the company in some other manner is as effective as a resolution passed at a general meeting, even if the assent is given at different times ...'. The respondents' concession, however, ends there. They contended that they had no knowledge of the issued shares and never assented to them.

[18] We will first address the principles enunciated in the *Duomatic case*. The *Duomatic* case concerns directors' remuneration, which required the shareholders' prior approval under the UK Companies Act 1948 and the company's articles of association. The directors there occasionally withdrew sums from the company as and when their personal needs required, without obtaining prior approval. The withdrawals, however, were reflected in the

company's accounts, which the directors approved. Buckley LJ held:

> *... where it can be shown that all shareholder who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.*

[19] We take the view that the *Duomatic* principle clearly applies whether the approval was given in advance or prior to the event. Approval can take many forms, such as agreement, ratification, waiver, or estoppel. This principle was clearly set out in the case of *EIC Services Ltd and another v Phipps and others* [2004] 2 BCLC 589 where Neuberger J held:

> The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. *Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether the members of the group give their consent in different ways at different times does not matter.* (Emphasis added.)

[20] This principle was further applied and enunciated in various later decisions: *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd and others* [1983] Ch 258, *Weatherley v Weatherley and others* [2019] 1 BCLC 520 and *Dickinson v NAL Realisations and others (Staffordshire) Ltd (Dickinson, third party and another)* [2020] 1 WLR 1122. The *Duomatic* principle has been applied by our courts in amongst others *Genisys Integrated Engineers Pte Ltd v UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 (CA) *Tan Mei Li & Ors v KSCH Property Sdn Bhd* [2019] MLJU 1827; [2019] CLJU 1186 (CA). In the latter case, the appellate court held:

> [89] We further agree with learned counsel for the appellants that the running or management of a company's affairs in the 'fashion' not usually understood or seen, where decisions in respect of some matters complained of were taken informally is no reason to suggest anythingless of such decision.

[21] The High Court had misconstrued the facts of the *Duomatic* case when it held that the assent in that case, namely the payment of the directors' salaries without the shareholders' approval, predated the act in question when it was clear that the shareholders' assent came months after the act. The High Court erred in holding that the approval had to be given prior to the shares being issued and had erroneously applied the correct law on the facts. We are of the opinion that the *Duomatic* principle applies whether the assent was given before or after the impugned act in question.

[22] We now come to the High Court's findings on the facts. There is no dispute that Form 11 was lodged with the Companies Commission of Malaysia, nor was the form alleged to be forged. This was concerning the EGM held on 28 September 2007. An ordinary resolution was passed at this EGM to increase WTK's paid-up capital by 4,000,000 shares. What seemed to have occupied the High Court was that WKN did not sign the form and that the appellant did not produce the resolution to Form 11 on the issued shares.

[23] WKC had, under examination, agreed that WKN and WKY were the brothers in charge of managing WTK Realty's business in Malaysia. It is, therefore, incongruous to deem Form 11 invalid as WKN signed it. As Kathryn had produced Form 11 evidencing that the EGM to approve the issuance of the 4,000,000 shares was held on 28 September 2007, the burden lies on the WKC to prove that the resolution was not attached to Form 11 or that the EGM never took place, mainly when WKC had access to the companies' books and records. The High Court erred in accepting WKC's contention that the resolution was not attached to Form 11 when the burden lies on him to prove so.

[24] In any event, even if we were to assume that there was no resolution attached to Form 11, this does not vitiate the resolution passed at the EGM or render the shares issued void. A case in point is the Singapore Court of Appeal's decision in *Jimat bin Awang* which dealt with s 161(1) of the SCA 1967 (the equivalent of s 132D of the CA 1965), which is as follows:

> Indeed the statutory regime is put in place primarily to protect the interests of shareholders so that directors cannot act to their detriment without their knowledge and prior consent. Although there is a requirement for any resolution giving prior approval to be filed, the failure to do so only attracts a fine. By itself, it does not vitiate the approval and consent of the shareholders. More crucially, it does not make the issue of the shares void ...

[25] We are therefore resolute that the High Court erred in disregarding Form 11 and failing to hold that WKN had failed to prove his assertion.

[26] There is then Form 24 dated 28 September 2007 on the allotment of 4,000,000 shares to WKN. It was not disputed that this Form had been lodged with the Registrar of Companies. The High Court, however, disregarded it because WKC did not sign it. The High Court also held that the form does not provide direct evidence that the shareholders' approval was obtained prior to shares being issued.

[27] The High Court disregarded the fact that both WKN and WKY had signed the form and that it was signed on behalf of the board of directors. That WKC did not sign the form does not negate assent or knowledge on his part. In

this case, many factors inferred WKC's knowledge from his conduct. Informal assent can be evidenced by conduct; *EIC Services*.

[28] The most compelling evidence to prove that the respondents had knowledge and acquiesced to the issued shares were the directors' report and audited accounts from as early as 2005 to 2011. The High Court had erroneously disregarded the evidence showing that the board had consistently approved the directors' reports throughout those years.

[29] One event in particular was when it was tabled at the Adjourned General Meeting ('AGM') of WTK Realty held on 30 June 2008. The minutes of the AGM show that WKC was present, although WKC had denied being present. The High Court erred when it preferred WKC's denial over contemporaneous records. It is the court's function to critically test oral evidence against contemporaneous documents. This tenet was enunciated by the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, where the apex court held as follows:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.*(Emphasis added.)

[30] Further, even though WKC did not sign the audited accounts, he had, under cross-examination, agreed with the suggestion that the report had been signed on his behalf by WKY. Faced with this admission, the High Court erred in holding that WKC could not have known or assented to the issued shares. Other documents were also lodged showing the issued shares, such as the Forms of annual return and circulars for the shareholders.

[31] The most critical evidence was WTK Realty's extraordinary general meeting ('EGM') held on 6 April 2013, where the shareholders, which included WKC and WKY, voted to approve the conversion and capitalisation of the convertible preference shares. The shareholders needed to approve increasing WTK Realty's share capital from 16,400,000 to 19,150,000 shares. This exercise was required to enable WTK Realty to obtain a banking facility as it desperately needed funds for working capital; the bank concerned required

an additional capitalisation of RM2.5m. WTK Realty had 16,400,000 ordinary shares at that time. This included the issued shares of 4,000,000 to WKN. The EGM was held to pass a resolution to convert and capitalise the preference shares, which led to the company's ordinary shares increasing from 16,4000,000 to 19,150,000. WKC and WKY had in that EGM voted in approval with full knowledge that WTK Realty's shares included the issued shares.

[32] Consequently, they had, by conduct, approved of the issued shares. WKC, under cross, admitted that he knew that the 4,000,000 issued shares were part of the 19,150,000 shares. The suits against Kathryn in respect of the issued shares was filed prior to the EGM.

[33] WKC and WKY could not approbate and reprobate. Given two choices, they must elect one stance. The English Court of Appeal in *Verschures Creameries, Limited v Hull and Netherlands Steamship Company, Limited* [1921] 2 KB 608 explained the concept of approbate and reprobate as follows:

> A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election — namely, that no party can accept and reject the same instrument: *Ker v Wauchope* (1); *Douglas-Menzies v Umphelby* (2). The doctrine of election is not however confined to instruments. *A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.*(Emphasis added.)

[34] The High Court clearly failed to find that WKC and WKY had approbated and reprobated. The shareholders' resolution passed at the EGM to capitalise the share capital, which included the issued shares, must be treated as an affirmation or ratification. All these factors that we have set out apply to the three companies.

[35] The High Court, in its findings, acknowledged that WKN and WKY had subsequent knowledge of the issued shares but held that they do not amount to prior unanimous assent of the shareholders. The High Court failed to consider that the family-owned companies conducted their business informally and would sometimes disregard formal requirements. The High Court had disregarded WKC's admission in his affidavit that not all shares issued in the corporate history of WTK Realty had complied with strict formalities under s 132D(1) of the CA 1965.

[36] Under the *Duomatic* principle, formalities may be disregarded if shareholders had, by conduct, waived the requirements; see *Herman v*

Simon (1990) 8 ACLC 1094. This is particularly applicable to family-run companies as it is a distinctive hallmark of family-run companies where the affairs are frequently conducted informally and often without adhering to the formal requirements of statutes or the company's AA.

[37] A final point to note is the delay by WKC and WKY in seeking declaratory reliefs. Their suits were commenced almost six to seven years after the shares were issued to WKN. The lengthy delay connotes knowledge and acquiescence on their part. As the remedy of declaration is discretionary in nature, the court should be less inclined to grant them where the party seeking the reliefs is guilty of laches; *Lim Teow Yong & Sons Sdn Bhd v Infolity Sdn Bhd & Anor* [2015] MLJU 2312. A lengthy delay would amount to acquiescence. This concept was lucidly explained in *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252 (HC):

> The word 'laches' is one of the most over-worked words in legal arguments before the courts and it does not seem to have been fully appreciated for its nature. It means definitely something more than a mere delay; it means such delay amounting to acquiescence. Here the word acquiescence is not quite the same acquiescence as used in equitable estoppel, where, generally a plaintiff stands by watching a violation of his right in progress and keeping silent, *but here, there is a completed violation of a right and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent.* (Emphasis added.)

CONCLUSION

[38] We are therefore unanimous in finding that the High Court had misdirected itself on the applicable law and applied it erroneously to the facts. We also opine that the High Court did not give sufficient judicial appreciation of the evidence before it. We are of the view that there are merits to Appeals No 42, 39 and 43 and unanimously allow the appeals. As the appellants' appeal in Appeals No 42, 39 and 43 are permitted; there is no necessity for the validation applications sought by the appellants in Appeals No 38, 44 and 41. The High Court's decisions are therefore set aside, including the costs. We further award costs of RM30,000 for each appeal here and below to the appellants subject to allocatur. Any costs paid at the High Court will be refunded to the appellants.

Appeals 42, 39 and 43 allowed; High Court's decisions including costs set aside;

costs of RM30,000 for each appeal here and below subject to allocatur awarded to appellant; any costs paid at High Court refunded to appellant.

Reported by Dzulqarnain Ab Fatar